

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0085

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD WEISWEAVER,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Twenty-First Judicial District Court,  
Ravalli County, The Honorable Jeffrey H. Langton, Presiding

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APPEARANCES:

STEVE BULLOCK  
Montana Attorney General  
MARDELL PLOYHAR  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

JOSLYN HUNT  
Chief Appellate Defender  
SARAH CHASE ROSARIO y NABER  
Assistant Appellate Defender  
139 North Last Chance Gulch  
P.O. Box 200145  
Helena, MT 59620-0145

GEORGE H. CORN  
Ravalli County Attorney  
T. GEOFFREY MAHAR  
Deputy County Attorney  
Courthouse Box 5008  
205 Bedford Street  
Hamilton, MT 59840

ATTORNEYS FOR DEFENDANT  
AND APPELLANT

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

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## **STATEMENT OF THE ISSUE**

Did Weisweaver's counsel provide ineffective assistance of counsel when he argued that Weisweaver should receive an alternative sentence but did not object to the district court's failure to explicitly consider the criteria for sentencing a nonviolent felony offender under Mont. Code Ann. § 46-18-225?

## **STATEMENT OF THE CASE**

Donald Weisweaver (Weisweaver), the Appellant, was convicted by a jury of Criminal Possession of Dangerous Drugs and Conspiracy: Criminal Possession with Intent to Distribute. (D.C. Doc. 73.) The district court sentenced Weisweaver to 5 years in the Montana State Prison for possession of dangerous drugs and 15 years with 5 years suspended for conspiracy to distribute drugs, with the sentences to be served concurrently. (Appellant's Ex. C at 4.) Weisweaver appeals his sentence.

## **STATEMENT OF THE FACTS**

### **I. THE OFFENSE**

Weisweaver and Sean Snow (Snow) arranged to have nearly one ounce of methamphetamine shipped from Weisweaver's mother in Bakersfield, California, to Snow. On May 7, 2009, law enforcement officials in Bakersfield noticed that

the package, which was being shipped by FedEx for overnight delivery, appeared suspicious. (11/2/09 Tr. at 130-32.) Detective David Boyd (Detective Boyd) with the Bakersfield Police Department investigated the package. Detective Boyd noticed that the street name on the return address was misspelled and discovered that the address listed was a boarded up and abandoned house. (11/2/09 Tr. at 131.) After a trained narcotics canine gave a positive alert for the presence of narcotics, Detective Boyd obtained a search warrant and confirmed that the package contained methamphetamine. (11/2/09 Tr. at 135, 141-42.)

The package was addressed to Sean Snow in Corvallis, Montana. (11/2/09 Tr. at 138.) Detective Boyd arranged a controlled delivery with Jase Basnaw (Detective Basnaw), a narcotics detective in the Ravalli County Police Department. (11/2/09 Tr. at 143, 201-02.) The package was shipped to Detective Basnaw and an undercover law enforcement officer delivered it to Snow on May 8, 2009. (11/2/09 Tr. at 143, 165-66, 171.) Snow signed for the package and took it into his apartment. (11/2/09 Tr. at 171, 181-82.) Shortly thereafter, officers entered Snow's apartment, arrested him, and conducted a search pursuant to a search warrant. (11/2/09 Tr. at 205, 208.) Officers located the unopened package in Snow's laundry basket. (11/2/09 Tr. at 206.) Subsequent testing revealed that the package contained nearly one ounce of methamphetamine that was 98.5 percent pure. (11/3/09 Tr. at 102, 105.) In addition, officers seized

multiple cell phones, a drug ledger, a scale, and over \$8,000 in cash from Snow's apartment. (11/2/09 Tr. at 208-09, 231-32.) His apartment also contained a MoneyGram in the amount of \$1,135 from a person in North Dakota. (11/2/09 Tr. at 144.)

After officers entered Snow's apartment, Snow received numerous messages from Weisweaver. Snow explained that Weisweaver was calling because he wanted the package and wanted Snow to deliver it to him. (11/2/09 Tr. at 210-12.) Eventually Weisweaver said he was coming to pick up the package, and officers arrested him as he was approaching Snow's residence. (11/2/09 Tr. at 174.) Officers located methamphetamine and marijuana on Weisweaver. (11/2/09 Tr. at 175, 195.)

Officers obtained significant information from the seized cell phones. One of the phones used by Snow contained a text message from Weisweaver listing the FedEx tracking number that was on the methamphetamine package. (11/2/09 Tr. at 221-22, 224-25.) Weisweaver's phone, which had been seized after his arrest, contained incoming and outgoing text messages with his mother, La Nora Pixler (Pixler), who lived in Bakersfield, California, within blocks of the abandoned house used as the return address on the package. (11/3/09 Tr. at 20-21; 11/3/09 Tr. at 191-92.) In the text messages sent on May 6, 2009, Weisweaver asked Pixler who has the goods, what is the price, and whether she could have it on its way the

next day if he sent the money down. (11/3/09 Tr. at 24-26, 120.) Shortly after midnight on May 7, 2009, Pixler sent Weisweaver a text containing the FedEx tracking number that was on the methamphetamine package. (11/3/09 Tr. at 27.) In addition, Weisweaver texted his mother a confirmation number for a MoneyGram. (11/3/09 Tr. at 29-30.) Officers discovered that Weisweaver sent his mother three MoneyGrams totaling \$1,450 on May 6-7, 2009. (11/3/09 Tr. at 69-76.)

## **II. THE PROCEEDINGS**

In a Second Amended Information, the State charged Weisweaver with Criminal Possession of Dangerous Drugs, a felony, Mont. Code Ann. § 45-9-102(1), (6); Accountability to Criminal Distribution of Dangerous Drugs, a felony, Mont. Code Ann § 45-2-302(3) and § 45-9-101(4); and Conspiracy: Criminal Possession with Intent to Distribute, a felony, Mont. Code Ann. § 45-4-102(1) and § 45-9-103(3), or in the alternative Accountability to Criminal Possession with Intent to Distribute, a felony, Mont. Code Ann. § 45-2-302(1), (3) and § 45-9-103(3). (D.C. Doc. 47.)

A three-day trial was held November 2-5, 2009. Officers testified about the investigation. Snow testified that he had loaned Weisweaver money and that Weisweaver was planning on repaying him by selling methamphetamine.



(11/3/09 Tr. at 147-48.) According to Snow, he was not selling drugs himself, but allowed Weisweaver to ship the package to his house. (11/3/09 Tr. at 161, 187.) A former prison inmate testified that Weisweaver told him while they were in prison that Weisweaver arranged for the purchase of the methamphetamine from his mother, and he planned on going to North Dakota with Snow to sell the methamphetamine. (11/3/09 Tr. at 200-01.)

The jury found Weisweaver guilty of Criminal Possession of Dangerous Drugs and Conspiracy: Criminal Possession with Intent to Distribute. (D.C. Doc. 73.) Prior to the sentencing hearing, Weisweaver's counsel, John J. Ferguson (Ferguson), filed a sentencing memorandum arguing that Weisweaver should be sentenced under the alternative sentencing authority provided in Mont. Code Ann. § 45-9-202. (D.C. Doc. 79.) Ferguson argued that because Weisweaver was a nonviolent offender and an addict, he should be sentenced to a treatment program, rather than prison. (D.C. Doc. 79.) Ferguson acknowledged that Weisweaver qualified as a persistent felony offender, but noted that the district court still had the authority to impose an alternative sentence. (D.C. Doc. 79 at 4-5.) Ferguson repeated that argument at the sentencing hearing. (12/23/09 Tr. at 12-13.)

The district court found that Weisweaver was a persistent felony offender and sentenced him to 5 years in prison on the possession conviction and 15 years with 5 suspended on the conspiracy conviction, to be served concurrently.

(12/23/09 Tr. at 19.) At the sentencing hearing and in the Judgment and Commitment, the district court explained its reasons for the sentence. The district court stated,

[Weisweaver] was convicted of his first drug charge in 2007 for possession of drug paraphernalia. In November of 2008, [Weisweaver] was convicted of his first felonies in Bakersfield, California, for receiving known stolen property and failure to appear on this charge, which apparently under California law is also a felony. . . . While [Weisweaver] was on probation, he was shot in the abdomen by either a woman's jealous boyfriend or as a random act of violence. The Court is unaware which version of this shooting is accurate, but clearly [Weisweaver] has given different accounts of what happened.

What is undisputed is that [Weisweaver] absconded probation by leaving the State of California and moving to Montana without permission. The jury found beyond a reasonable doubt that [Weisweaver], while in Montana on absconder probation status, conspired with co-defendant Sean Snow to obtain an ounce of unadulterated methamphetamine from [Weisweaver's] mother in Bakersfield, California. [Weisweaver] had the methamphetamine shipped to Mr. Snow in Ravalli County. . . . It appears to the Court that the primary motivation for this offense was not to obtain the drug for personal use, but to sell the drug for money that could be used to repay debts to drug dealers.

There is no doubt in the Court's mind that [Weisweaver] and Mr. Snow were heavily involved in the methamphetamine trade at a time when [Weisweaver] was absconding felony probation; therefore, [Weisweaver] is not entitled to any consideration under the alternative sentencing authority of the statutes. [Weisweaver] is also found to be a persistent felony offender under Montana law, and as such the persistent felony offender sentencing statute, Mont. Code Ann. [§] 46-18-502(1), applies.

. . . [Weisweaver] appears to have a methamphetamine addiction, which could potentially be treated, but the Court believes it

is beyond any doubt that addiction to methamphetamine requires lengthy treatment and cannot be treated in a short-term program. In [Weisweaver's] case, this treatment should also be obtained in a secure setting.

(Appellant's Ex. C at 8-9 (emphasis added); accord 12/23/09 Tr. at 16-18.)

### **SUMMARY OF THE ARGUMENT**

Weisweaver's counsel, Ferguson, provided adequate assistance of counsel when he argued that Weisweaver should be sentenced to a treatment facility, rather than prison, pursuant to Mont. Code Ann. § 45-9-202. The district court rejected that argument and imposed a significant sentence. Although the district court did not expressly consider the criteria for an alternative sentence in Mont. Code Ann. § 46-18-225, the court provided detailed reasons for imposing a significant sentence and explained why Weisweaver was not entitled to an alternative sentence. Ferguson was not ineffective for failing to object to the district court's failure to explicitly consider the criteria in Mont. Code Ann. § 46-18-225 because it was clear from the court's order that the such an objection would be futile.

Furthermore, Weisweaver has failed to demonstrate that an objection would have had any impact on his sentence. The court's explanation for imposing a 15-year sentence demonstrates that the court would never have imposed an alternative sentence had Ferguson objected. Therefore, Weisweaver has failed to demonstrate that he received ineffective assistance of counsel.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Ineffective assistance of counsel claims raise mixed questions of fact and law, which this Court reviews de novo. Whitlow v. State, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861.

### **II. WEISWEAVER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL’S PERFORMANCE WAS NOT DEFECTIVE AND WEISWEAVER WAS NOT PREJUDICED BY HIS COUNSEL’S PERFORMANCE.**

This Court reviews ineffective assistance of counsel claims applying the two-prong test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail, the defendant must establish: (1) that counsel’s performance was deficient; and (2) that the deficient performance prejudiced the defense. Baca v. State, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948. A trial counsel’s performance is deficient if it falls “below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances.” Whitlow, ¶ 20. To establish that counsel’s performance was deficient, the defendant must overcome a strong presumption that counsel’s actions were within the broad range of reasonable professional assistance. Baca, ¶ 17. To establish that the defendant was prejudiced

by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Id.

This Court reviews ineffective assistance of counsel claims on direct appeal if the claims are based solely on the record. State v. Rovin, 2009 MT 16, ¶ 24, 349 Mont. 57, 201P.3d 780 Ineffective assistance of counsel claims predicated on trial counsel's failure to object can be decided on the basis of the record and should be raised on direct appeal. State v. Meredith, 2010 MT 27, ¶ 51, 355 Mont. 148, 226 P.3d 571. Weisweaver's challenge to his counsel's failure to object to the sentence is appropriate for review on direct appeal.

In this case, Weisweaver's counsel, Ferguson, argued that Weisweaver should receive an alternative sentence pursuant to Mont. Code Ann. § 45-9-202. Montana Code Annotated § 45-9-202(1) authorizes sentencing courts to sentence persons convicted of felony dangerous drug offenses to alternative sentences that do not involve imprisonment. The alternative sentences that the court may impose include commitment to a residential drug treatment facility. Mont. Code Ann. § 45-9-202(2).

Sentencing courts also have the authority to sentence nonviolent felony offenders to alternative sentences pursuant to Mont. Code Ann. § 46-18-225. Montana Code Annotated § 46-18-225 provides that a court sentencing a

nonviolent felony offender must consider alternatives to imprisonment and shall examine ten sentencing criteria.<sup>1</sup> If the court sentences the nonviolent felony offender to prison, the court is required to “state the reasons why the judge did not select an alternative to imprisonment, based on the criteria contained in (2).” Mont. Code Ann. § 46-18-225(3).

Although a district court is required to consider the factors in Mont. Code Ann. § 46-18-225, this Court has declined to reverse a conviction where the court failed to consider the criteria for alternative sentencing when the defense

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<sup>1</sup> Mont. Code Ann. § 46-18-225(2) provides that a court sentencing a nonviolent felony offender must consider whether:

- (a) the interests of justice and the needs of public safety truly require the level of security provided by imprisonment of the offender in a state prison;
- (b) the needs of the offender can be better served in the community or in a facility or program other than a state prison;
- (c) there are substantial grounds tending to excuse or justify the offense, though failing to establish a defense;
- (d) the offender acted under strong provocation;
- (e) the offender has made restitution or will make restitution to the victim of the offender’s criminal conduct;
- (f) the offender has no prior history of conviction for a criminal act or, if the offender has a prior history of conviction for a criminal act, the offender has led a law-abiding life for a substantial period of time before the commission of the present crime;
- (g) the offender’s criminal conduct was the result of circumstances that are unlikely to recur;
- (h) the character and attitude of the offender indicate that the offender is likely to commit another crime;
- (i) the offender is likely to respond quickly to correctional or rehabilitative treatment;
- (j) imprisonment of the offender would create an excessive hardship on the offender or the offender’s family.

counsel failed to object and the sentence was otherwise a legal sentence.

State v. Swoboda, 276 Mont. 479, 481-82, 918 P.2d 296, 298 (1996); State v. Nelson, 274 Mont. 11, 906 P.2d 663, 687 (1995).

A court must generally sentence a persistent felony offender to a minimum five-year sentence, but courts may depart from the persistent felony offender requirements to impose an alternative sentence pursuant to Mont. Code Ann. § 45-9-202 and § 46-18-225. State v. Brendal, 2009 MT 236, ¶¶ 24-31, 351 Mont. 395, 213 P.3d 448; see also State v. Shults, 2006 MT 100, 332 Mont. 130, 136 P.3d 507. District courts are given broad discretion to determine the appropriate sentence because they are in the best position to weigh the evidence and judge the credibility of the witnesses. Shults, ¶ 37.

In the sentencing memorandum and at the sentencing hearing, Ferguson argued that Weisweaver should be sentenced pursuant to the alternative sentencing authority that applies specifically to drug offenses. (D.C. Doc. 79 and 12/23/09 Tr. at 12-13.) He argued that because Weisweaver was an addict, Weisweaver should be sentenced to a treatment facility rather than prison. The district court rejected that argument, determined that a prison sentence was more appropriate, and sentenced Weisweaver to 15 years in prison.

Ferguson provided effective representation by arguing that his client deserved an alternative sentence. After the district court concluded that

Weisweaver was not entitled to an alternative sentence, provided significant support for that conclusion, and imposed a substantial prison sentence, Ferguson's failure to object to the district court's failure to expressly address the criteria in Mont. Code Ann. § 46-18-225(2) did not fall below an objective standard of reasonableness. Although the district court did not cite to the criteria in Mont. Code Ann. § 46-18-225(2), it was clear that the district court had considered whether Weisweaver should receive an alternative sentence and had determined that he should not. Thus, Ferguson was not ineffective for failing to object.

Furthermore, Weisweaver did not suffer any prejudice from Ferguson's failure to object to the district court's failure to mention the criteria in Mont. Code Ann. § 46-18-225(2) at the time of sentencing. The sentence the district court imposed and the reasons the district court provided for imposing the 15-year sentence demonstrate that the district court would have imposed the same sentence even if Ferguson had objected. The district court explained that it was imposing the 15-year sentence because Weisweaver had been convicted of another drug charge in 2007, was convicted of two felonies in 2008, had absconded from felony probation, was purchasing the methamphetamine to sell it, and qualified as a persistent felony offender. The criteria in Mont. Code Ann. § 46-18-225 are designed to prevent incarceration of offenders who do not have a significant criminal history, have justification for their offense, are unlikely to reoffend, and



are not a threat to public safety. See Mont. Code Ann. § 46-18-225. Weisweaver's criminal history and the fact that he absconded from probation in California demonstrate that an alternative sentence is not appropriate for Weisweaver.

Weisweaver argues that that his criminal history is all a result of his relocation to California, and is therefore unlikely to reoccur in Montana. (Appellant's Br. at 9.) The drug offenses in this case, however, occurred while Weisweaver was in Montana, after he had left California. Weisweaver used his California connections to ship methamphetamine, which he intended to distribute, to Montana. There is no reason to believe Weisweaver would not continue to commit drug offenses in Montana. Weisweaver also argues that the needs of public safety do not require that he be imprisoned. The fact that Weisweaver was involved in a conspiracy to distribute methamphetamine, however, rather than just use the drug, demonstrates that he is a threat to public safety. In addition, Weisweaver argues that because the average time taken for an inmate to complete a methamphetamine addiction treatment program is nine months, Weisweaver's needs could have been better served in a treatment facility. The district court indicated, however, that it believed that Weisweaver required long-term treatment to treat his methamphetamine addiction. Because none of the factors in Mont. Code Ann. § 46-18-225(2) demonstrate that Weisweaver is an appropriate candidate for an alternative sentence, he has failed to demonstrate a reasonable

probability that, but for counsel's allegedly deficient performance, the district court would have imposed an alternative sentence.

In sum, Weisweaver has failed to demonstrate both that his counsel's performance was deficient and that he was prejudiced by his counsel's performance. Thus, his ineffective assistance of counsel claim must fail.

### **CONCLUSION**

This Court should affirm Weisweaver's sentence because Weisweaver did not receive ineffective assistance of counsel.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 2010.

STEVE BULLOCK  
Montana Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: \_\_\_\_\_  
MARDELL PLOYHAR  
Assistant Attorney General

### **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be hand-delivered into the wire basket located in the reception area in the Attorney General's Office, 215 North Sanders, Helena to:

Ms. Sarah Chase Rosario y Naber  
Assistant Appellate Defender  
139 North Last Chance Gulch  
P.O. Box 200145  
Helena, MT 59620-0145

and mailed First Class Mail to:

Mr. T. Geoffrey Mahar  
Deputy Ravalli County Attorney  
Courthouse Box 5008  
205 Bedford Street  
Hamilton, MT 59840

DATED \_\_\_\_\_

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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